No. 4637

United States
Circuit Court of Appeals
For the Ninth Circuit

TAKEYO KOYAMA,

Appellant,

vs.

A. E. BURNETT, Immigration Inspector of the Port of Honolulu, Hawaii,

Appellee.

Brief on Behalf of Appellant

Upon Appeal from the United States District Court for the Territory of Hawaii

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I

STATEMENT OF THE CASE

This is an an appeal from a judgment entered in the United States District Court in and for the District and Territory of Hawaii on February 21, 1925, in a habeas corpus case filed in said Court where Takeyo Koyama, appellant here, was petitioner. (*Record, pages* 40 *and* 41).

THE PETITION. The petition for writ of habeas corpus, which was addressed to the Honorable J. B. Poindexter, then Judge of the District Court of the United States in and for the District and Territory of Hawaii, alleges that petitioner was born in Japan and is a subject of the Emperor of Japan; that she first arrived at the port of Honolulu on May 18, 1918

and upon her arrival was married, according to the laws of the Territory, to Matsuichi Koyama, who was born in the Territory on August 18, 1892 and holds a Certificate of Hawaiian Birth issued by the Secretary of Hawaii; that the petitioner is a musician able to make a living by her musical knowlelge; that on June 26, 1922, petitioner went to Japan for the purpose of having the child of petitioner and her said husband placed in the care of petitioner's aunt; that petitioner intended to return to Hawaii from Japan, remain a short time and then proceed to Los Angeles to join her husband who is engaged in business in that city; that before leaving here for Japan, petitioner signed and verified, under oath, before a Notary Public, an affidavit alleging the marriage as aforesaid, and the American citizenship of her husband; that said affidavit was accompanied by the certificate of the Attorney General of the Territory of Hawaii to the effect that the Notary Public taking the oath was duly authorized to so do; that before leaving Japan and returning to the Territory of Hawaii, petitioner visited the Consulate of the United States at the port of Yokohama, where she took and subscribed an oath before the American Vice Consul to the effect that she was the same person mentioned in the affidavit above referred to and that it was the intention of petitioner to depart from the port of Yokohama, Japan, on board the Tenyo Maru sailing June 6, 1923, for the

purpose of returning to Honolulu to join her husband who is an American citizen. To the affidavit taken before the American Consul, there is attached the photograph of petitioner; that upon presentation of the affidavit made in Honolulu before departure and the signing of the affidavit made before the American Vice Consul, petitioner was informed by the American Vice Consul at the port of Yokohama that in view of the fact that petitioner is the wife of an American citizen no passport would be required and thereupon petitioner left said port of Yokohama on board the steamship Tenyo Maru on the 6th of June, 1923, bound for the port of Honolulu, bearing the affidavits aforesaid and without a passport issued by the government of Japan.

That upon arriving at the port of Honolulu, on or about the 16th day of June, 1923, one immigrant inspector, Jackson L. Milligen, examined petitioner, and acting alone, held petitioner for examination before a Board of Special Inquiry of the Immigration Service at the port of Honolulu; that petitioner was examined before said Board of Special Inquiry on the 16th and 18th days of June, 1923, and at the conclusion of the examination, petitioner was informed by the Chairman of the Board that she was denied a landing in the United States and was ordered deported to Japan, she being notified of her right to appeal to the Secretary of Labor.

That petitioner signed an appeal to the Secretary of Labor, not being represented by counsel, and petitioner upon information and belief alleges that her appeal was forwarded to the Secretary of Labor by the Immigration Inspector in Charge, said appeal being accompanied by a statement of the case made by the Inspector in Charge. Petitioner upon information and belief alleges that the Acting Secretary of Labor affirmed the excluding decision of the Board of Special Inquiry.

That petitioner is imprisoned by Richard L. Halsey, United States Immigration Inspector in Charge at the port of Honolulu at the United States Immigration Station, Honolulu, under the holding of said Board of Special Inquiry, affirmed by the Acting Secretary of Labor and that it is the intention of the Inspector in Charge to deport petitioner to Japan by the first available steamer for that purpose.

Petitioner alleges that the imprisonment is illegal for the following reasons:

First: She was held for examination before the Board of Special Inquiry by one inspector, contrary to the provisions of Subdivision 1, Rule 3 of the Immigration Rules of May 1, 1917;

Second: That the hearing before the Board of Special Inquiry was not a fair and impartial hearing but was an unfair hearing and constituted a mere semblance of a hearing;

Third: That as a matter of law, the findings of the Board of Special Inquiry were illegal for the reason that they failed to take into account the fact that petitioner was the wife of an American citizen and had the right to enter the United States without a passport;

Fourth: That the document verified before the Vice Consul at Yokohama was the equivalent of a passport and gave the right to petitioner to enter the United States. The prayer is for a writ of habeas corpus directing the Immigration Inspector in Charge to produce the body of petitioner before the Court to the end that the said imprisonment may be inquired into and that upon a hearing the same may be made perpetual and the petitioner discharged from custody thereunder.

The petition was verified by the petitioner on August 6, 1923. (*Record, pages* 5 *to* 12.)

EXHIBITS ATTACHED TO PETITION.

There is attached to the petition the following exhibits:

Exhibit "A." Affidavit of Takeyo Koyama dated June 21, 1922, taken before a Notary Public, stating that she is a subject of the Japanese Empire and first arrived in the Hawaiian Islands on May 18, 1918; that she was married to Matsuichi Koyama; that her husband is an American citizen. (*Record, pages* 12 *and* 13.)

Exhibit "B." Certificate of the Attorney General

as to the authority of the Notary Public taking the foregoing affidavit.

Exhibit "C." Copy of Affidavit taken before Paul E. Jenks, Vice Consul of the United States of America at the port of Yokohama, declaring that affiant is the same person mentioned in the affidavit, Exhibit "A," and that it is her intention to return to Honolulu, as aforesaid. (*Record, pages* 15 *and* 16.)

Exhibit "D." Copy of testimony taken before the Board of Special Inquiry at the port of Honolulu on June 16, 1923, together with proceedings had at the conclusion of said hearing. (*Record, pages* 16 *to* 26.)

Exhibit "E." Appeal to the Secretary of Labor, without the services of an attorney, from the decision of the Board of Special Inquiry. (*Record, page* 26.)

Exhibit "F." Letter of Inspector in Charge dated the 20th of June, 1923, transmitting the appeal and expressing the opinion of the Inspector in Charge concerning certain features of the findings of the Board of Special Inquiry. (*Record, pages* 26 *to* 29.)

Exhibit "G." Letter of G. G. Tolman, Immigrant Inspector for the Commissioner General notifying the Inspector in Charge at the port of Honolulu of the receipt of his letter of June 20 and the affirmations of the excluding decision. (*Record, pages* 29 *and* 30.)

THE ALTERNATIVE WRIT OF HABEAS CORPUS. On August 7, 1923, an alterna-

tive writ of habeas corpus was issued by the Honorable J. B. Poindexter, then Judge of said District Court, ordering the Inspector in Charge to produce the body of petitioner before the Court on August 15, 1923, and further ordering that petitioner be discharged from custody upon her giving an approved bond in the penal sum of One Thousand Dollars ($1,000.00) for her appearance in court whenever thereunto ordered by a Judge thereof. (*Record, pages* 30 *to* 32.)

DEMURRER TO PETITION. Fred Patterson, Assistant United States Attorney, attorney for respondent, filed a demurrer to the petition above referred to, alleging that said petition does not states facts suffcient to warrant the Court to enter an order discharging the petitioner from custody; that it does not appear from the petition what are the facts upon which petitioner concludes that the hearing before the Board of Special Inquiry was not a fair and impartial hearing and that it affirmatively appears that the petitioner is not entitled to be released from custody and praying that the demurrer be sustained and the alternative writ of habeas corpus, heretofore issued, be dismissed. (*Record, pages* 32 *and* 33.)

DECISION. A decision was filed by the Honorable W. T. Rawlins, Judge of said District Court, on February 13, 1925, the decision holding, first, that the hearing before the Board of Special Inquiry was a fair one; second, that petitioner did not become an Ameri-

can citizen by reason of her marriage to an American citizen; and third, that petitioner not having provided herself with a passport and the affidavits made in Honolulu and at the American Consulate in Japan, not having the force or taking the place of a passport, she cannot be admitted to the United States. The demurrer was sustained and petitioner's writ of habeas corpus dismissed. (*Record, pages* 33 *to* 40.)

JUDGMENT. On February 21, 1925, judgment was entered in said cause dismissing the alternative writ of habeas corpus and remanding petitioner to the custody of A. E. Burnett, Inspector in Charge of Immigration at the port of Honolulu. (*Record, pages* 40 *and* 41.)

APPEAL. On March 2, 1925, petitioner filed her petition for appeal and admission to bail pending appeal, (*Record, pages* 45 *and* 46,) accompanied by an assignment of errors, (*Record, pages* 47 *to* 49), order allowing appeal and releasing prisoner on bail in the sum of One Thousand Dollars ($1,000.00), (Record, page 50), citation, (*Record, pages* 51 *and* 52, a supersedeas bail bond was given. (*Record, pages* 53 *and* 54), an appeal bond for costs, (*Record, pages* 56 *and* 57.)

II

SPECIFICATION OF THE ERRORS RELIED UPON.

The appellant relies upon the following errors:

First: The Court erred in holding and deciding that the proceedings before the Board of Special Inquiry clearly disclose that the hearing was a fair one. (*Assignment No.* 2).

Second: The Court erred in holding and deciding that the effect of the Act of March 2, 1921 was to extend the passport and vise provisions of the Act of May 22, 1918, beyond the period set forth in that Act. (*Assignment No.* 3).

Third: The Court erred in holding and deciding that the provisions of the Act of May 22, 1918, were not "in force only during the existence of a state of war and are therefore not repealed by the joint resolution of March 3, 1921." (*Assignment No.* 4).

Fourth: The Court erred in holding and deciding as follows:

"The petitioner herein not having provided herself with a passport; and the affidavits, one made in Honolulu and the other before the American Consul of Yokohama, Japan, not having the force or taking the place of a passport, as required by the statutes above quoted, cannot be admitted to the United States." (*Assignment No.* 5).

Fifth: The Court erred in sustaining the demurrer filed in said Case. (*Assignment No.* 6).

Sixth: The Court erred in not holding that petitioner and appellant is wrongfully held and illegally imprisoned and dismissing her petition for writ of habeas corpus and remanding her into custody for deportation. (*Assignment No.* 1).

Seventh: The Court erred in entering judgment discharging the alternative writ of habeas corpus and remanding petitioner to the custody of the Inspector in Charge. (*Assignment Nos.* 7 *and* 8).

III

ARGUMENT.

First: (a). ***IT WAS UNFAIR THAT PETITIONER SHOULD BE HELD FOR EXAMINATION BEFORE THE BOARD OF SPECIAL INQUIRY BY ONE INSPECTOR, TOWIT: BY INSPECTOR JACKSON L. MILLIGEN.***

Section 16 of the Immigration Laws of February 5, 1907, provides, inter alia, as follows:

"All aliens arriving at ports of the United States shall be examined by at least two immigration inspectors at the discretion of the Secretary of Labor and under such regulations as he may prescribe."

Rule 3 of the Immigration Rules of May 1, 1917, provides as follows:

"Subdivision 1. Double Inspection. At each of the ports of New York * * * Honolulu, two immigrant inspectors shall pass upon the case of each arriving alien. The two inspectors to serve together for this purpose shall be designated from day to day by the immigration officials in charge at such port. The challenging of decisions of one inspector by another shall be continued."

The petition shows that when the petitioner arrived at the port of Honolulu on her return to Hawaii, she was held for examination before one inspector. This fact has never been denied and is admitted by the demurrer. It may well be that if two inspectors had examined the alien in the first place, she would have been immediately allowed to land. This right of double examination is a substantial one and any examination before a Board of Special Inquiry, upon the action of one inspector, is in contravention of the rights of the alien.

(b) *THE EXAMINATION OF THE PETITIONER BY THE MEMBERS OF THE BOARD OF SPECIAL INQUIRY WAS UNFAIR.*

We respectfully call the Court's attention to the following parts of this examination:

The alien having testified that her husband went to Los Angeles on September 1, 1920, was asked this question. "How is it you should separate for such a long time and you go to Japan and he to the States?"

A. "I postponed going to the Mainland because we would like to send our child to Japan and then I would like to go and join my husband."

Q. "Why didn't he take you and the child to the Mainland with him?"

A. "My aunt in Japan said to us 'I will take care of your child.'" * * *

Q. "Why is it that you let your aunt take care of your child? He is only three years old and was very young when you took him to Japan?"

A. "I left my child with my aunt and I am going to the Mainland to get work."

Q. "You do not think very much of your child, do you?"

A. "No." (*Record, pages* 18 *and* 19.)

This testimony evidently had great weight in the mind of the chairman of the Board (Inspector Farmer) for he says (*Transcript, page* 23), "she is not the kind of woman whom I would consider desirable as a resident of this country. * * * but a woman who states that she does not care for her child and takes him to Japan and gives him in charge of an aunt is certainly not of the highest type of a woman though that is not a fact which would exclude her from admission." (*Record, pages* 23 *and* 24).

This testimony is explained by the Inspector in Charge, Mr. Halsey, in his letter to the Secretary of Labor, as follows:

"After the answer that she had left her child with her aunt she was asked, 'You do not think very much of your child, do you?' she answered 'No.'

The Inspector in the memorandum infers from this answer that she does not care for her child and is a woman who has no natural feeling. As I speak the Japanese language and understanding how a question like this might be put by an interpreter with a different understanding from the import that was intended to be conveyed by the Inspector and that the language would be very idiomatic, I asked the Interpreter what expression he used. He stated that he asked her if she was 'suspended much in her mind, about the child,' which we would freely translate whether she was worried or uneasy about the child and she replied, 'No'—she states that by her answer she meant she was not worried because in many ways her aunt knows how to take care of the child better than she would herself. (22)

The same difficulty in translating expressions in regard to thinking is seen in other languages—you may recall, that, in King James version of the Bible there is the translation—'Take no thought for the morrow' the translation of the Revised Version is 'Be not anxious,' which is beyond question the proper translation. However, this matter

does not impress me as being material as the decision is based on the fact that she is an alien without a passport. The appeal is submitted for such action as may commend itself to you in view of the showing in relation thereto."

The alien was interrogated as to her occupation.

Q. "What has been your occupation?"

A. "Nothing in Japan. I was a waitress at the Kikizuki Tea House, Vineyard Street, this city."

Q. "How long were you a waitress there?"

A. "Six months." (*Record, page* 17).

That the alien had made an honest living as a waitress seems to have prejudiced the mind of the chairman of the Board of Special Inquiry, and for aught it appears to the contrary, the minds of the members of the Board, for the chairman says "she is not the kind of woman whom I would consider desirable as a resident of this country. The occupation in which she has been engaged is one in which the persons engaged in it are often of questionable character, though not necessarily so." (*Record, page* 23).

Our domestic servants in Hawaii are generally of the Japanese race. As a rule, they are law abiding, self respecting, honest and intelligent servants. There is nothing in the fact of being engaged in domestic service which tends to throw discredit upon the servant.

The chairman of the Board of Special Inquiry also adverts to the fact that the alien "has lived for about

three years separate from her husband, although only married to him five years and that arouses suspicion, but like the other facts, does not furnish facts that she is excludable." (*Record, page* 24).

It seems from the evidence that the husband of the alien, when in Honolulu, carried on the business of a florist. That in 1920, he went to Los Angeles for the purpose of conducting the business there. (*Record, page* 21).

If the husband and wife agreed that the aunt in Japan knew better how to bring up their child, than they did themselves, that is no concern of the immigration officials. There is no law excluding aliens because their ideas of social expediency as to members of their own family do not coincide with those of the officials of the Immigration Department.

Again, Mr. Farmer says "Then why did she not go to California instead of to Hawaii if she intends to join her husband? That has not been satisfactorialy explained." Nor was an explanation, satisfactory or otherwise, necessary under the circumstances. The alien relates the facts of the case and we respectfully submit that there is nothing in those facts reflecting or tending to reflect any discredit upon the alien. It will be noted that the Board of Special Inquiry in excluding the alien expressly refused to recommend a waiver of the passport and vise regulations in this case. (*Record, page* 25). This refusal shows that the members of the

Board of Special Inquiry, for some occult reason which does not appear in the record, had formed a prejudice against the alien; which prejudice, undoubtedly, influenced the members of the Board in arriving at a decision, particularly a decision not to recommend a waiver.

We respectfully submit that the hearing was an unfair one.

Second and Third: ***THE COURT ERRED IN HOLDING AND DECIDING THAT THE EFFECT OF THE ACT OF MARCH*** 2,1921, ***WAS TO EXTEND THE PASSPORT AND VISE PROVISIONS OF THE ACT OF MAY*** 22, 1918, ***BEYOND THE PERIOD SET FORTH IN THAT ACT.***

THE COURT ERRED IN HOLDING AND DECIDING THAT THE PROVISIONS OF THE ACT OF MAY 22, 1918, ***WERE NOT "IN FORCE ONLY DURING THE EXISTENCE OF A STATE OF WAR AND ARE THEREFORE NOT REPEALED BY THE JOINT RESOLUTION OF MARCH*** 3, 1921."

The Act of May 22, 1918, (40 *Statutes at Large* 559, 2 *U. S. Comp Stat.* 1916, *Supplement of* 1919, *page* 1495), provides as follows:

"DEPARTURE FROM OR ENTRY INTO UNITED STATES DURING WAR; ALIENS.

That when the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe."

In pursuance of the power thus conferred upon the President, a proclamation was issued on August 8, 1918, containing the following provisions:

". No citizen of the United States shall receive a passport entitling him to leave or enter the United States, unless it shall affirmatively appear that there are adequate reasons for such departure or entry and that such departure or entry is not prejudicial to the interests of the United States.

"2. No alien shall receive permission to depart from or enter the United States unless it shall

affirmatively appear that there is reasonable necessity for such departure or entry and that such departure or entry is not prejudicial to the interests of the United States."

(40 *Statutes at Large* 559, 2 *U. S. Comp. Stat. Supplement of* 1919,*page* 1496.)

The Act of March 2, 1921, (41 *Statutes at Large* 1217) being the Diplomatic and Consular Appropriation Act, after appropriating the sum of Six Thousand Dollars for the expenses of regulating entry into the United States under the Act of May 22, 1918, provides as follows:

"Provided that the provisions of the Act approved May 22, 1918, shall, in so far as they relate to requiring passports and vises from aliens seeking to come to the United States, continue in force and effect until otherwise provided by law."

On the day following the approval of the Diplomatic and Consular Appropriation Act, towit, on March 3, 1921, a Joint Resolution was passed (41 *Statutes at Large* 1359), providing in part as follows:

"That in the interpretation of any provision relating to the duration or date of the termination of the present war or of the present or existing emergency, meaning thereby the war between the Imperial German Government and the Imperial and Royal Austro-Hungarian Government and the Government and people of the United States,

in any Acts of Congress, joint resolutions, or proclamations of the President containing provisions contingent upon the duration or the date of the termination of such war or of such present or existing emergency, the date when this resolution becomes effective shall be construed and treated as the date of the termination of the war or of the present or existing emergency, notwithstanding any provision in any Act of Congress or joint resolution providing any other mode of determining the date of such termination. And any Act of Congress, or any provision of such Act, that by its terms is in force only during the existence of a stare of war or during such state of war and a limited period of time thereafter, shall be construed and administered as if such war between the Governments and people aforesaid terminated on the date when this resolution becomes effective, any provision of such law to the contrary notwithstanding."

The foregoing, we believe, represents the condition of the law at the time when the appellant left Yokohama on her return to Hawaii on June 6, 1923 aboard the steamship "Tenyo Maru."

The foregoing statutory provisions are referred to and discussed in an opinion of the Attorney General (H. M. Daugherty) to the Secretary of State (32 *Opinions of Attorney General* 493) in which opinion

the Attorney General concludes that in view of the recent enactment of the Act of March 2, 1921, the Joint Resolution of March 3, 1921, does not have the effect of repealing the provisions of the Act of May 22, 1918, and of the regulations issued pursuant thereto which relate to requiring passports and vises from aliens seeking to come to the United States.

It is difficult to follow the reasoning of the Attorney General when he arrived at this conclusion. It is true that as stated by the Attorney General "effect must be given to all legislative provisions as far as may be and that the legislature is presumed to be fully advised of the exact state of prior legislation in enacting later." But, there is no rule of law, with which we are acquainted, requiring a certain lapse of time before a prior statute can be repealed. We respectfully submit that the language of the Joint Resolution of March 3, 1921, is clear and unambiguous, and that so far as the present case is concerned it had the effect of repealing the statute of May 22, 1918.

The foregoing statutory provisions were considered by this Court in the case of *Sichofsky vs. U. S.*, 277 *Fed.* 762. This case was decided on January 9, 1922, more than nine months after the opinion of the Attorney General, above referred to, had been written. This decision bears no reference to the opinion of the Attorney General and we, therefore, feel justified in believing either that the opinion was not called to the attention of

the court or that the court differed from the Attorney General in the conclusions arrived at.

The Sichofsky case is not very helpful in the case at bar for the reason that Sichofsky had plead guilty to an offense under the statute of May 22, 1918, committed in 1920 and that, therefore, his case came within the saving clause contained in the Joint Resolution of March 3, 1921, providing that no exemption from prosecution for violations of the act committed prior to March 3, 1921, should be a defense and it was for this reason that the judgment of the lower court was affirmed.

We respectfully submit that as far as the present case is concerned, the Act of May 22, 1918, is repealed by the Joint Resolution of March 3, 1921.

Fourth: ***THE COURT ERRED IN HOLDING AND DECIDING THAT THE PETITIONER, NOT HAVING PROVIDED HERSELF WITH A PASSPORT AND THE AFFIDAVITS NOT HAVING THE FORCE OR TAKING THE PLACE OF A PASSPORT AS REQUIRED BY THE STATUTES ABOVE QUOTED, CANNOT BE ADMITTED TO THE UNITED STATES.***

We are unable to find any statute requiring that the wife of an American citizen shall be provided with a passport before being allowed to reenter the United States after a temporary absence abroad.

Section 2 of the Act of May 22, 1918, (40 Statutes at Large, 559), provides that after the proclamation referred to in said Act has been made and published, it shall be unlawful for any *citizen of the United States* to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport. Section 1 of the Act provides that after the proclamation therein referred to, it shall, unless otherwise ordered by the President or Congress be unlawful for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations and orders and subject to such limitations and exceptions as the President shall prescribe, and Section 2 of the President's proclamation of August 8, 1918, provides that "no alien shall receive permission to depart from or enter the United States unless it shall affirmatively appear that there is reasonable necessity for such departure or entry and that such departure or entry is not prejudicial to the interests of the United States." (2 *U. S. Comp. Stat.* 1916, 1919 *Suppl.* 1496.)

The Act of June 14, 1902 (32 *Statutes at Large* 386, 7 *U. S. Comp. Stat.* 1916, 8137), provides that "no passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States." The appellant did not by reason of her marriage become a citizen of the United States or owe allegiance thereto. It has

never been contended that she did and the special finding of the trial judge that she was not a citizen by reason of her marriage (*Record, page* 36) was unnecessary.

The Act of May 22, 1918, and the proclamation issued thereunder, did not require that an alien should have a passport before being permitted to reenter the United States.

It certainly appeared, in the examination of the alien before the Board of Special Inquiry, that there was reasonable necessity for the alien to enter the United States for the purpose of rejoining her husband and it certainly appeared that the reentry of appellant was not prejudicial to the interests of the United States.

The section provides that no alien shall receive permission to enter the United States unless, etc., but it is silent as to the person from whom the permission is to be obtained.

It will be remembered that the alien, prior to her departure from Hawaii, signed an affidavit as to her identity and upon this affidavit she was allowed to depart (*Record, pages* 6 *and* 7). In preparation for her return to Hawaii, she presented herself at the Consulate of the United States at the port of Yokohama and subscribed an oath before the Vice Consul, her affidavit being accompanied by her photograph, and thereupon she was informed by the Vice Consul, that in view of the fact that she was the wife of an American citizen,

no passport would be required. (*Record, pages* 7 *and* 8).

The latter affidavit was subscribed and sworn to before the Vice Consul, was ensealed with the Consulate seal and the fee of Two Dollars collected. (*Record, pages* 15 *and* 16). Having taken these precautions and received the advice of the Vice Consul, likewise his permission to depart for Hawaii (for otherwise she would have been unable to obtain passage on the steamer), she had a perfect right to believe and did believe that she, as the wife of an American citizen, had received permission from the proper authorities to reenter the United States.

We respectfully submit, therefore, that the court erred in holding and deciding that appellant should be excluded from the United States because she did not have a passport.

Fifth: ***THE COURT ERRED IN SUSTAINING THE DEMURRER FILED IN SAID CAUSE.***

The respondent, after the issuance of the alternative writ of habeas corpus, filed a demurrer to the petition for writ of habeas corpus alleging that the petition does not state facts sufffficient to entitle the petitioner to the relief prayed for therein. (*Record, pages* 32 *and* 33).

This demurrer was sustained. The alternative writ of habeas corpus dismissed. (*Record, page* 39).

We submit that the order sustaining the demurrer was erroneous for the following reasons:

(a) The United States is estopped by the act of its agent from demanding the exclusion of petitioner. Section 7 of the petition (*Record, page* 8), is as follows:

> "That upon the presentation of the affidavit Exhibit "A" and the signing of the affidavit Exhibit "C," your petitioner was informed by the Vice Consul of the United States at the port of Yokohama, that in view of the fact that your petitioner is the wife of an American citizen, no passport would be required and accordingly petitioner left the port of Yokohama on board the steamship "Tenyo Maru" on or about the 6th day of June, 1923, bound for the port of Honolulu, bearing the affidavits aforesaid and without the passport issued by the Government of Japan."

From Exhibit "C," it appears that Mr. Paul E. Jenks, Vice Consul of the United States of America at Yokohama, Japan, vised the affidavit and collected the fee of Two Dollars, ensealing the affidavit with the Consular seal, and the appellant, feeling that she had done everything required to be done, secured her ticket and travelled to Honolulu.

We submit that even though the Court should hold that the Act of May 22, 1918, was not repealed, as far as this case is concerned, by the Joint Resolution of March 3, 1921, the Court would be justified in consid-

ering the acts of the American Vice Consul as amounting to an estoppel on the part of the Government. In the case of *U. S. vs. Moy Non,* 249 *Fed.* 772, the Court held that:

> "Where a Chinese person, before returning to China for a visit, presented himself to the Bureau of Immigration for preinvestigation as to his status as a merchant, and the Bureau found that he had for the required time been engaged as a merchant and gave him a certificate, the government is, after his return from China, estopped from questioning his status as a merchant, where there was no competent proof of fraud on his part in obtaining reentry into the United States."

(b) The appellant does not come within any of the classes excluded under the Immigration Laws of the United States. The Immigration Laws of the United States provide for the exclusion of certain classes of aliens seeking to enter the United States. These classes are defined in Sections 3, 18 and 23 of the Act of 1917 as amended in 1918 and 1920, and said Act nowhere provides that the wife of an American citizen shall be excluded merely because she does not have a passport.

There is likewise no provision in the Rules of May 1, 1917, adopted by the Department of Labor, Bureau of Immigration, providing for such exclusion, and while the various Acts relating to passports provide punish-

ment for infraction of the law, they do not provide for exclusion. These Acts are Act of 1866 (14 *Statutes at Large,* 54), Act of June 14, 1902, (32 *Statutes at Large* 386), Act of June 15, 1917, (40 *Statutes at Large* 227), Act of May 22, 1918, (40 *Statutes at Large* 559), Act of July 2, 1921, (43 *Statutes at Large* 147), and Act of November 10, 1919, (41 *Statutes at Large* 353).

(c) The wife of an American citizen is entitled to land in the United States by reason of the citizenship of the husband. (*Hosaye Sakaguchi vs. White,* 277 *Fed.* 913).

This was a case decided in this Court where it was held that the wife (a Japanese) was entitled to land in the United States by reason of the residence of her husband therein even though the husband did not desire to receive her. (See also *Ex parte Shue Hong,* 286 *Fed.* 38; *Tsoi Sun vs. U. S.,* 116 *Fed.* 920-923; *U. S. vs. Gue Lim,* 176 *U. S.* 459).

It is not the policy of the United States to prevent a citizen or person lawfully residing in the United States from having the society of his wife and children. (*Quan Hing Sun, et al., vs. White,* 254 *Fed.* 402; *Hosaye Sakaguchi vs. White,* 277 *Fed.* 913; *Ex parte Chan Shee,* 236 *Fed.* 579; *U. S. Lee Chee,* 224 *Fed.* 447; *U. S. on the Relation of Shuey Quen vs. Pearce,* 285 *Fed.* 663; *Ex parte Shue Hong,* 286 *Fed.* 381;

Tsoi Sim vs. U. S., 116 *Fed.* 920; *U. S. vs. Gue Lim*, 176 *U. S.* 459).

In conclusion, we respectfully submit that the case of *Church of the Holy Trinity vs. U. S.*, 143 *U. S.* 457, applies in the case at bar. In that case, as pointed out by the Supreme Court, a strict construction of the Statute would result in the exclusion of the minister who sought to land under a contract with the Trustees of Holy Trinity Church, but the Supreme Court held that the spirit of the law should be consulted rather than the strict letter thereof.

We respectfully submit that the appellant did everything that she could; took every precaution, and that it would be unjust and not within either the letter or the spirit of the law to exclude her.

We submit that the judgment should be reversed.

Dated at Honolulu, this 1st day of October, A.D. 1925.

Respectfully submitted,
LIGHTFOOT & LIGHTFOOT,
By J. LIGHTFOOT
Attorneys for Takeyo Koyama,
appellant.